Appellate counsel had offered to ship his file to Respondent and Respondent refused to allow him to do so. While in Texas, Respondent did not meet with Mr. Hicks' trial or appellate counsel and did not meet with Mr. Hicks. It does not appear there was any legitimate purpose for the trip. See ¶¶ 7-10 of Ex. 2; ¶¶ 5-10 of Affidavit of Gary Udashen attached as Exhibit 5 to this Information and ¶¶ 1-6 of Affidavit of Vicki L. Steel attached as Exhibit 6 to this Information.

d. Respondent did not place the $1,000 fee for travel expenses in Fulcher, LaSalle, Brooks, Smith & Daniels, L.L.C. ("the Firm's")[1] trust account or the Firm's operating account. See ¶ 13.c of Affidavit of Elizabeth Springate attached as Exhibit 7 to this Information.[2]

e. Mr. Smith was not admitted to the United States Supreme Court and did not request admission to the United States Supreme Court. Consequently, he should not have taken on any representation of a client before the Supreme Court. See August 24, 2005, letter from Perry Thompson, Admission Officer to the United States Supreme Court attached as Exhibit 8 to this Information.

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[1] From February 1, 2004, until April 15, 2005, Respondent was a member of the Firm of Fulcher, LaSalle, Brooks, Smith & Daniels, L.L.C.

[2] Ms. Springate has requested that her Affidavit be filed under seal. Informant has filed a motion with this Court requesting such.

f. Respondent did not file a petition for certiorari with the United States Supreme Court. Instead, on March 7, 2005, the day that the petition was due, Respondent filed a motion for extension of time. In his motion, Respondent stated he was requesting additional time to file the petition because he had not received the legal file from previous counsel until February 26, 2005. Judge Scalia denied the motion. See Certified Copy of Respondent's Motion for Extension of Time To File Writ of Certiorari and March 10, 2005, letter from William K. Suter, Clerk of the Supreme Court, attached as Exhibit 9 to this Information.

g. Supreme Court Rule 13.5 provides that motions for extensions of time for petitions of certiorari must be filed at least ten days before the petition is due unless there are extraordinary circumstances. Respondent did not assert that there were extraordinary circumstances which prevented him from requesting the extension of time before the due date of the petition. See Ex. 9; United States Supreme Court Rule 13 attached as Exhibit 10 to this Information.

h. Respondent did not provide the United States Supreme Court with accurate information about the reason he was seeking an extension of time. In his motion Respondent inferred that Mr. Hicks' appellate counsel had not provided Respondent with the requested documents in a timely manner. Mr. Hicks' former appellate counsel had written to Respondent on February 1, 2005, offering to ship Mr. Hicks' file to Respondent. Respondent refused the offer and insisted upon *traveling* to Texas to obtain the files. In addition, Respondent waited until February 24, 2005, almost

the due date of the petition before he traveled to Texas to retrieve the file. See ¶¶ 6-10 of **Ex. 5.**

I. Moreover, even when an attorney requests an extension of time more than ten days in advance of the petition's due date, the United States Supreme Court rarely grants such. See *Madden v. Texas,* 498 U.S. 1301 (1991) (Court denied request for extension of time for filing petition of certiorari in death penalty case where defendant had obtained new counsel for filing of petition). Consequently, competent appellate counsel would not have requested an extension of time but would have ensured that he filed the actual petition by the due date. See copy of *Madden v. Texas,* 498 U.S. 1301 (1991), attached to this Information as Exhibit 11.

j. Respondent did not inform Mr. Hicks or his parents that rather than filing a petition for certiorari all he had done was file a motion for extension of time or that the Supreme Court had denied his motion. Respondent did not communicate with Mr. Hicks or his family at all regarding his actions. See ¶¶ 10-11 of Ex. 3; ¶¶ 11-12 of Ex. 2; ¶ 8 of Ex. 4.

k. When Mr. Hick's parents and sister learned from outside sources what had occurred they requested a refund from Respondent. Respondent has refused to refund any money to them contending that his fee was justified because he spent a great deal of time reviewing Mr. Hicks' files and transcripts. Elizabeth Springate, the paralegal who worked with Respondent at the time, never saw Respondent spend any time working on the matter. See ¶ 15 of Ex. 2; ¶¶ 9-10 of Ex. 4; ¶¶ 11b of Ex. 7; Respondent's response to the

Hicks' complaint is attached as Exhibit 12 to this Information.

1. Mr. Hicks has been greatly harmed by Respondent's actions.

I.) Mr. Hicks' appeal was based, in part, on a challenge to the Federal Sentencing Guidelines and the fact that the district court judge had determined Mr. Hicks' sentence based upon facts not charged in the indictment and not found by the jury to be true. The Fifth Circuit ruled against Mr. Hicks on December 7, 2004, but during oral arguments acknowledged that the United States Supreme Court had *United States v. Booker* under submission. The Fifth Circuit further acknowledged that if the Supreme Court ruled in favor of Mr. Booker the Supreme Court would surely grant certiorari to Mr. Hicks as Mr. Hicks' attorneys had properly preserved the issue. See ¶ 4 of Ex. 5.

ii.) On January 12, 2005, the Supreme Court issued its decision in *United States v. Booker,* 125 S. Ct. 738 (2005). The United States Supreme Court held, among other things, that: (i) the facts used in sentencing must be determined by a jury rather than a judge; (ii) the sentencing guidelines were advisory rather than mandatory; and, (iii) its ruling was applicable to all cases upon review whereby the issue had been properly preserved.

iii.) On August 16, 2005, Mr. Hicks' former appellate counsel, Mr. Gary Udashen, moved the United States Supreme Court to accept Mr. Hicks'

petition for certiorari out of time and is currently awaiting a ruling on his motion.[3] Mr. Udashen asserted that the Supreme Court should accept the petition based upon the Court's ruling in *Booker* and because of Respondent's acted incompetently and fraudulently in representing Mr. Hicks. Petitioner's Motion to Accept Out of Time Petition For Writ of Certiorari is attached as Exhibit 23 to this Information.

m. Respondent has not cooperated with Mr. Hicks' counsel in attempting to gain certiorari for Respondent. Mr. Hicks' appellate counsel wrote to Respondent on June 6, 2005, and requested that he return the files he had obtained from appellate counsel as appellate counsel had not kept copies of all of the documents he had given to Respondent. Respondent has not returned any of the files or responded to appellate counsel's letter. See ¶¶ 13-17 of Ex. 5.

n. Based upon Informant's investigation, there is probable cause to believe Respondent is guilty of violating:

i.) Rule 4-1.1 (competence) in that he agreed to file a petition for certiorari in the United States Supreme Court when he was not admitted to the Court and had no prior experience in preparing such petitions;

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[3] The docket for the United States Supreme Court states that the United States Supreme Court will address the matter at its January 6, 2006, conference.

ii.) Rule 4-1.3 (diligence) in that he did not prepare a petition for certiorari on Mr. Hicks' behalf in a timely manner;

iii.) Rule 4-1.4 (communication) in that he did not communicate with his client about his plan of action or advise his client of what action he had taken or the Court's ruling on his motion;

iv.) Rule 4-1.5 (unreasonable fees) in that:

(1.) Respondent's attorney's fee is exorbitant given that the only action he took on the matter was to file a motion for extension of time to file the petition; and

(2.) Respondent charged Mr. Hicks $1,000 in travel expenses to travel to Texas to pick up files from Mr. Hicks' appellate attorney when Mr. Hicks' appellate attorney had offered to ship the files to Respondent.

v.) Rule 4-1.15(a) (holding client's funds in trust account) in that Respondent did not place the $1,000 he received for travel expenses into a trust account;

vi.) Rule.4-1.16(d) (upon termination of representation protecting client's interest) in that Respondent did not return the files he received from Mr. Hicks' appellate attorney after the appellate attorney requested he return the files;

vii.) Rule 4-3.3(a) (knowingly making a false statement of material fact to a tribunal) when he stated in his motion for extension of time that he needed additional time to prepare the petition for certiorari because he had to travel to Texas to get Mr. Hicks' files when, in fact, appellate counsel had offered to ship the files to Respondent several weeks earlier; and

viii.) Rule 4-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) in that he took Ms. Hicks' money under the false pretenses that he would prepare a petition for certiorari on Mr. Hicks' behalf when, in fact, he had no intention of doing so.

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[p.45]

Respectfully submitted,

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

By:_____

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